[Not reported]

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO.834 OF 2001.

1. Yunus @ Yunus Builder @]
   Hakim Fakir Mohd. Shaikh]
   Aged about 30 years,]
   permanently residing at]
   28/30, New Bangalipura Estate]
   2nd floor, Room No.14, Dongri]
   Mumbai 400 003.]
2. Anwar Noor Mohd.Shaikh]
   Aged about 25 years,]
   permanently residing at]
   Gangawadi, Gopal Bhawan,]
   Near M.K.Stores,]
   Ghatkopar(W), Mumbai 400 086]
3. Amina Abdul Razak Shaikh]
   Aged about 65 years,]
   permanently residing at]
   Gangawaid, Gopal Bhawan,]
   Near Hussaini Masjid,]
   Ghatkopar (W), Mumbai 400086]
4. Muzzamil Mohamad Sheikh]

Aged about 39 years,]
permanently residing at]
1st floor, Luciana Building]
Jivdani Lane, Temple Road,]
Vorar (E), Thane] Appellants.
(All at present under going] (Original
the sentence imposed upon] Accused Nos.
them at Yerawada Road Central] 2 to 5)
Prison, Pune.]

versus.

The State of Maharashtra] Respondent.

Mr.M.S.Mohite for Mr.S.R.Pasbola for the appellants.
Mr.A.M.Shringarpure, APP, for the State.

CORAM : D.G.DESHPANDE,J.
DATED : 2nd September 2004.

ORAL JUDGMENT :

1. This appeal is filed by original accused Nos. 2 to 5. I heard counsel for the accused and learned APP for the State.

2. Accused Nos. 2 to 5 have been convicted

by the Special Court constituted under MCOC Act in MCOC Special Case No.10 of 2000 as they were found guilty for the offence under Section 3(2) of the MCOC Act read with Section 120-B of the Indian Penal Code and, sentenced to suffer R.I. for five years and to pay fine of Rs.5 lakhs in default to suffer R.I. for one year.

3. Accused Nos. 2 to 4 were found guilty under Section 3(4) of the MCOC Act read with Section 120-B of the Indian Penal Code on the ground that they were the members of organized crime syndicate led by Ali Budhesh operating from Behrin and Izaz Pathan. They have been sentenced to suffer R.I. for five years and to pay fine of Rs.5 lakhs in default to suffer R.I. for one year. Accused No.5, is, however, acquitted of the offence under Section 3(4) of the MCOC Act read with Section 120-B.

4. Accused Nos. 2 to 5 were also found guilty for offence under Section 25 (1-B)(a) read with Section 3 of the Arms Act and sentenced to suffer R.I. for three years and to pay fine of Rs.5,000/- in default to suffer R.I. for six months.

5. Accused No.4 Amina was found guilty under Section 3(5) and Section 4 of the MCOC Act for acquiring illegal wealth and money with the help of organised crime syndicate etc. and sentenced to suffer R.I. for 5 years and to pay fine of Rs.5 lakhs in default to suffer R.I. for one year.

6. A secret information was received by PSI D.P.Kadam that three persons were going to arrive at hotel Shivam Sundaram, Thakur Complex on Western Express Highway at Kandivli (East), Mumbai. PSI D.D.Davre, who was the first informant, gave this information to his superior officers and then, under the guidance of superior officers, police party, headed of those officers, went near the spot. They laid a trap and at about 12.40 in the afternoon, they saw one auto rickshaw coming near the hotel. Accused Nos. 1 to 3 got down from the said auto rickshaw. Their movements were found suspicious. They were, therefore, searched in presence of the panchas between 12.50 p.m. to 14.30 p.m. and mobile phone, one 9 mm pistol with magazine and certain live cartridges and two sim cards were recovered

from accused No.1. The articles were separately packed, sealed and labelled. From the search of accused No.2 one .38 bore revolver, five live cartridges, two more cartridges and one sim card were recovered. And from the possession of accused No.3 one .32 bore revolver and two live cartridges were recovered. All the articles were seized under the panchanama and accused were arrested and the FIR was registered.

7. Thereafter on 9.11.1999 again a secrete information was received that one lady was going to arrive with weapons. Then PSI Gavde from Kandivli Police Station and others went to Sahar Road, Near New India Co-operative Bank and laid a trap. At that time accused No.4 Amina came there with plastic bag in her hand. During search, yellow metal ornaments weighing about 462.050 grams valued at Rs.2,12,500/- ; one country made revolver with wooden grip; six live cartridges and cash of Rs.1,30,000/- were recovered from her. These articles were seized under the panchanama (Exhibit P-22) and she came to be arrested. On the same day and in the same manner accused No.5 Muzamil Mohd. Shaikh was found in possession of certain cartridges. They were also

packed, sealed and labelled.

8. Then as per the prosecution case, accused No.1 on 12.11.1999 expressed his desire to make a voluntary statement under Section 27 of the Evidence Act. It was recorded under Panchanam Ex.P-12. Thereafter, he laid police party to a room in Michalwadi behind Sainath Chawl, Sahar Village Church Pakhadi Road, Andheri (East). The accused took out one cloth bag from beneath the cot and in the pillow cover there one .32 bore country made revolver; another .32 bore revolver and 94 live cartridges of different description were found. All them were recovered and seized under the panchanama Ex.P-12A. In the background of the matter, MCOC Act was invoked and applied. Approval was granted under Section 23(1)(a) of the MCOC Act and the charge sheet was filed.

9. Therefore, it is a case of the prosecution that all the accused Nos. 1 to 5, (Accused No.1 is absconding), in association with wanted accused Ali Budhesh, Mohd. Izaz Pathan and Rafiq Shaikh @ Rafiq Dabha had entered into criminal conspiracy to commit organized crime like extortion etc. in the city of Mumbai and

had acquired illegal money and fire arms and ammunition as a result of crime by or on behalf of organized crime syndicate led by Ali Budhesh and Izaz Pathan operating through their henchmen from beyond the boundaries of India.

10. The trial Court accepted the case of the prosecution in its entirety and convicted the accused and sentenced them as above.

11. The question that arose before this court is, whether in the absence of any evidence of actual commission of any organised crime; in the absence of any evidence about existence of any syndicate allegedly headed by wanted accused Ali Budhesh or Mohd.Izaz Pathan or Rafiq Shaikh; whether in the absence of any confessional statement of other accused regarding existence of syndicate or crimes committed by them in the past or about the crime they were to commit in future, the court was justified in convicting the accused under Section 3 and other sections of the MCOC Act and sentenced them accordingly.

12. Admittedly, the answer to all these question is in the negative. There is no iota of

evidence and nothing has been discussed by the Special Court about any kind of specific conspiracy entered into by these accused with the gangsters named above. There is no evidence of existence of syndicate. There is no evidence that the accused with the help of aforesaid offences committed any kind of crime in the past or were going to commit any kind of crime in future in furtherance of their common intention.

13. What the prosecution case at the most proves is that the accused were found with arms and ammunitions at a particular place and nothing more or nothing less. Therefore, in this background of the matter there is absolutely no justification in invoking the MCOC Act and applying the same to the accused. At the most it is an offence under Section 399 of the Indian Penal Code i.e. preparation to commit dacoity. However, even in this regard, the advocate for the accused submitted that Section 399 of the Indian Penal Code would not apply. Firstly because there is no charge under Section 399 of the Indian Penal Code, and secondly because in the first instance accused Nos. 1, 2 and 3 were found; thereafter accused No.4 was found and

accused No.5 was found thereafter and, therefore, there is no connection between them to show that there was meeting of mind amongst all the four or five accused for the purpose of committing dacoity. Advocate for the accused, therefore, contended that conviction of accused No.1 at the most can be upheld under the Arms Act and they are required to be acquitted under the MCOC Act.

14. The learned APP, however, pointed out that all the weapons seized were sent to the Chemical Analyser i.e. to the ballistic expert who, as per para 18 of the judgment, found that residue of fired ammunition - nitrite - was detected in the barrel washings of these weapons showing that they were used for firing prior to their receipt in the laboratory. The learned APP for the State contended that from this evidence it could be inferred that the weapons were used before they were recovered from the accused.

15. Advocate for the accused, however, submitted that from this evidence it was dangerous to hold that the weapons were used by the accused for actual commission of any crime. He contended that no such inference could be

drawn, merely because, residue of fired ammunition was detected in the barrel washings. He further contended the weapons could have been used for test firing either by the accused or by the persons from whom the accused got those weapons.

16. I find considerable force in this submission made by the advocate for the accused and same is liable to be accepted.

17. The trial Court has drawn presumption under Section 22 against the accused on the basis of sim cards recovered from their possession which shows that the sim cards were used in the commission of offence for communication or association with wanted accused Ali Budhesh, Mohd. Izaz Pathan and Rafiq Shaikh. Mere communication on mobile phone without there being any evidence of any type about any illegal activities of the so called syndicate is of no use. It is altogether different that the arms and ammunition found with the accused. In spite of having full opportunity to thoroughly probe the past activities of all the accused arrested, absolutely no evidence was collected by the

investigating agency of any crime by the accused as a member of syndicate or even individual crime. The trial Court, has, in coming to the conclusion about existence of syndicate and activities thereof, relied upon discovery statement of accused Imran Nasir Shaikh (Ex.P-12) in which he stated that he would show the place where, out of the weapons given to him by Rafiq Dabha at the instance of Ali Budhesh from Beharin for the purpose of committing murder of gangsters of Chhota Shakil, three revolvers and bullets were kept. Firstly, this entire discovery statement is not at all admissible and particularly confessional part has to be totally discarded.

18. Therefore, for invoking presumption under Section 22 what is required is the proof of use of arms or other materials including documents and papers in the commission of such offence. There is absolutely no proof in this case that the aforesaid weapons were used in the commission of any offence. Therefore, the trial Court erred in invoking the presumption against the accused.

19. The learned APP, in spite of his best

efforts, could not satisfy me as to how, in the facts and circumstances of the case, the accused could be convicted under MCOC Act. In these circumstances and in the absence of evidence, the conviction of the accused under MCOC Act is liable to be set aside and quashed. The accused cannot also be convicted under Section 399 of the Indian Penal Code because firstly there is no charge and secondly even though five persons in all were arrested with arms, they came to be arrested at different stages on different dates. There is no connection to show that all the five had common intention to commit any dacoity. However, the conviction under the Arms Act is required to be maintained.

20. At this juncture my attention was drawn by the advocate for the accused to para 20 of the judgment of the Special Court wherein the Court has made certain remarks against Advocate Pasbola which are as under :-

> Para 20 :- The conduct of accused no.1 who escaped from custody during the pendency of this case while he was taken to the Court of Metropolitan Magistrate at

Mazgaon speaks volumes against him as to his criminal liability for offences committed because prospects of long sentence of imprisonment in this case must have impelled him to escape from lawful custody. The two police men who allegedly aided him to escape are facing prosecution for aiding and abetting the escape by accused no.1 vide M.C.O.C. Special Case No.9 of 2001. The ld. advocate Mr.Pasbola who represented accused no.1 also could not effectively co-operate with the police to trace and rearrest the accused no.1 so as to bring him to justice. It is desirable that advocates representing the accused must also know about the social roots of their clients in such cases to ensure that culprits must not be allowed to escape from due process of law and the culprits must be brought to book."

and he submitted that such remark was not required, not necessary and it is great injustice to the individual lawyer. The learned APP did not dispute that such remark should not have been passed by the Court. The remark is, therefore, expunged from the judgment of the trial Court.

21. So far as the sentence is concerned, advocate for the accused contended that appellant No.1 Yunus Shaikh and Appellant No.2 Anwar Shaikh were arrested on 7.11.1999 and they are in custody till today i.e. for about four years and nine months.

22. It was further submitted by the counsel for the appellants that appellant No.3 Amina was arrested on 9.11.1999. She was granted bail on 11.4.2000 by the Sessions Court. After conviction on 25.09.2001, she was taken into custody. She was ordered to be released on bail by the Supreme Court on 14.8.2003. She has thus been in custody for more than 2 years and three months. He further contended that accused No.4 Amina is a 60 years old lady. Therefore, he prayed that even though under the Arms Act maximum sentence is three years, she should be

let off on the period already under gone by her.

23. It was also submitted by the counsel for the appellants that appellant No.4 - Muzzamil Sheikh was arrested on 9.11.1999. He was granted bail pending trial by the Sessions Court on 16.3.2000. After the conviction on 25.9.2001 he was taken into custody. On 6.12.2001 he has been granted bail by this Court. He has thus been in custody for more than 6 months. He further contended that Appellant No.4 is acquitted by the trial Court for the offence under Section 3(4) of the MCOC Act and only thing that was found with him is 8 live cartridges. No pistol, no revolver was found with him. Therefore, he should also be let off on the period already undergone.

24. So far as accused Nos. 2 and 3 are concerned, he did not make any specific submission. In view of this, the following order is passed :-

:ORDER:

1. Appeal filed by the accused/appellants is partly allowed.

2. Conviction of all the accused/appellants under all the Sections of the M.C.O.C. Act read with Section 120-B of the Indian Penal Code is set aside along with the sentences imposed upon them.

3. Conviction of all the appellants under Section 25 (1-B)(a) read with 3 of the Arms Act is maintained. So far as Appellant Nos. 1 and 2 are concerned, the sentence of three years with fine of Rs.5 thousand in default of fine R.I. for six months imposed upon them for the said offences is maintained

4. So far as Appellant No.3 and 4 are concerned, their sentence is reduced to the period already undergone. However, the sentence of fine of Rs.5000/- in default R.I. for six months is maintained. Appellant Nos. 3 and 4 to pay fine amount within four weeks from today. Appellant Nos. 3 and 4 are on bail, their bail bonds shall stand cancelled after the fine is paid.

5. So far Appellant No.1 and 2 are

concerned, they are already in custody for more than four years and six months. Therefore, they shall be released forth with if not required in any order case.

6. In view of this order, the Criminal Bail Application No.3432 of 2003 does not survive, it is disposed of.

7. Appeal is disposed of accordingly.

[D.G.DESHPANDE]

02/09/2004. JUDGE.